

### **Remarks**

In the current Office Action, the Examiner has withdrawn the previous rejections under 35 U.S.C. § 112. The Examiner has maintained the rejection of Claims 1-10 under 35 U.S.C. § 103(a), as allegedly being obvious in view of several prior art references discussed therein. Applicant asserts that, in view of the foregoing amendments to the claims and the following remarks, the rejections under § 103(a) should be withdrawn. Specifically, Applicant asserts that the currently pending claims should be allowed because (1) all claims have been amended to exclude the use of fragrance in the formulations recited therein to neutralize odor caused by vaginitis; and (2) with respect to Claims 4 and 7, such claims have been further amended and narrowed, to require the use of the formulations *consisting of* the elements recited therein, which are vastly different than any combination described in the prior art.

**I. The rejections under 35 U.S.C. § 103(a) should be withdrawn.**

**A. Claims 1-10 have been amended to be limited to devices and methods for neutralizing odor caused by vaginitis -- without the use of any fragrances.**

A key aspect of the present invention is its ability to neutralize and control odor caused by vaginitis, *without* the use of a fragrance. **Exhibit C** to Applicant's Response to the Non-Final Office Action, filed on March 26, 2008 under 37 C.F.R. § 132, demonstrated the significant and unexpected ability of the claimed devices and methods to control odor *without* the use of a fragrance. Claims 1-10 have all been amended to require that the liquid compositions used with the devices and methods claimed therein *exclude* the use of any fragrance. That is, the claims have all been amended to *consist of* only the recited elements (which do not include any fragrance). MPEP § 2111.03 ("the

transitional phrase “consisting of” excludes any element, step, or ingredient not specified in the claim.”).

The primary reference that the Examiner relies upon in rejecting the currently-pending claims is the article “Compendium of Pharmaceutical Excipients for Vaginal Formulations” by Garg et al. (referred to herein as “Garg et al.”). Garg et al. disclose a host of different vaginal formulations, which are described to be useful for a wide range of different applications, namely, spermicidal contraceptives, cervicitis, vulvovaginitis, vaginal irritation, vaginal acidity maintenance, microbicides, anti-trichomoniasis, cervical ripening, bacterial vaginosis, yeast infection treatments, anti-viral treatments, progesterone supplements, and the list goes on. (Garg et al., p.16-17). Each different formulation disclosed in Garg et al. is correlated with its own indication or therapeutic use. (*Id.*). The Examiner cites the following composition from Garg et al. on page 3 of the Office Action:

Messengill	Towel	SmithKline	Lactic acid, water, sodium lactate, potassium sorbate, D-4,	Cleanse external
		Beecham	EDTA, cetyltrimonium chloride, fragrance	vaginal area.

(Garg et al. p.17). Garg et al. teach that the above formulation is designed to “cleanse [the] external vaginal area” (it says nothing about neutralizing odor caused by vaginitis).

As the Examiner should appreciate, it is well-settled law that when a claim excludes an element (*e.g.*, a fragrance) that a reference (*e.g.*, Garg et al.) requires, that is the epitome of unobviousness. *See, e.g., In re Freed*, 165 USPQ 570, 572 (CCPA 1970); *In re Duva*, 156 USPQ 90, 94 (CCPA 1967); *In re Fischer*, 179 USPQ 304, 305 (CCPA 1973); *In re Marosi*, 218 USPQ 289, 292 (Fed. Cir. 1983); *Ex parte Cordova*, 10 USPQ2d 1949, 1951 (BPAI 1988); *Ex parte Grasselli*, 231 USPQ 393, 394 (Bd. App. 1983); and *Ex parte Kaiser*, 189 USPQ 816 (Bd. App. 1975).

Moreover, it is important to note that the “fragrance” component of the cited Garg et al. formulation is not a ubiquitous component that is recited in the various formulations of Garg et al. That is, it is not a superfluous ingredient that is haphazardly referenced in all formulations. Indeed, among the more than 50 different formulations listed on pages 16-17 of Garg et al., only three (3) formulations recite the use of a fragrance (one of these three formulations being the formulation that the Examiner cites). Accordingly, the express teaching of Garg et al. is that the formulation cited by the Examiner requires the use of a “fragrance.”

Again, an important and significant part of the claimed invention is its ability to neutralize and control odor caused by vaginitis, *without* the use of a fragrance. The claims have been amended to exclude any use of a fragrance, which plainly renders the claims non-obvious over the cited formulation in Garg et al. and the other references cited in the current Office Action.

**B. The “picture claims” -- Claims 4 and 7 -- have been amended to not only exclude the use of a fragrance, but also to be limited to the specific elements and quantities recited therein.**

As set forth in MPEP § 2111.03, the transitional phrase “consisting of” excludes any element, step, or ingredient not specified in the claim. There are several limitations of Claims 4 and 7 (which represent very narrow “picture claims” of the present invention) that are not disclosed in the collection of prior art cited in the current Office Action. For example, the following limitations are not found in the prior art:

- As discussed above, the portion of Garg et al. that is referenced in the current Office Action requires the presence of “fragrance,” whereas Claims 4 and 7 exclude any use of a “fragrance.”

- The cited prior art does not teach the amount of the odor absorbing agent required in Claims 4 and 7.
- The cited prior art does not teach the amount of antiseptic (cetylpyridinium) required in Claims 4 and 7.
- The portion of Garg et al. that is referenced in the current Office Action requires the presence of “sodium lactate,” whereas Claims 4 and 7 exclude the use of such chemical in the devices and methods claimed therein.

Therefore, in view of the foregoing differences between Claims 4 and 7 and the cited prior art, and further in view of the reasons set forth in Section I.A above, Claims 4 and 7 should be allowed to issue.

## **II. Conclusion**

In view of the Amendments to the Claims and the Remarks above, Applicant respectfully requests that the current rejections under § 103 be withdrawn, and that Claims 1-10 be allowed to issue.

Respectfully submitted,

/s/ James Surber, Reg. No. 48,381